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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

No. 200

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit,

and

BRIEF IN SUPPORT THEREOF.

WARNER FULLER,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

212 Union Station,
St. Louis 3, Missouri,
GArfield 6600.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this honorable Court to grant and issue its writ of certiorari directed to the United States Court of Appeals for the Eighth Circuit (hereinafter sometimes referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered April 27, 1950, rehearing in which was denied May 22, 1950, affirming a judgment of the United States District Court within

and for the Eastern Division of the Eastern Judicial District of Missouri, in this cause, in favor of respondent and against your petitioner herein; and styled on the docket of court below: Terminal Railroad Association of St. Louis, a corporation, appellant, v. the United States of America, appellee, No. 14,068, Civil.

OPINIONS OF THE COURT BELOW.

The majority and minority opinions of the court below in said cause of Terminal Railroad Association of St. Louis, a corporation, v. the United States of America, which is by this petition sought to be reviewed, appear on pages 10 to 18, both inclusive, of the printed transcript of the record filed herein. Petitioner is unable at this time to include herein the citation of the opinions of the court below in said cause in the Federal Reporter because said opinions have not yet appeared in said publication.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed was brought under the Federal Tort Claims Act [Laws of 1946, Public Law 601, Chapter 753, Section 401, et seq., 28 U. S. C. A., Secs. 1346 (b) and 2674]. The jurisdiction of this Court is based upon 62 Stat. 928, 28 U. S. C. A., Sec. 1254, providing for review in this Court by certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. Authorities sustaining the jurisdiction are:

United States v. Aetna Casualty & Surety Company;
United States v. World Fire & Marine Insurance Company;
United States v. Yorkshire Insurance Company, and
United States v. Home Insurance Company, 94 L. Ed. (Adv. Op.), 151 et seq., decided December 12, 1949.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action under the Federal Tort Claims Act, 28 U. S. C., Secs. 1346 (b) and 2674 [28 U. S. C. A., Secs. 1346 (b) and 2674] on account of damages paid by petitioner to one Fitzjohn, who was in its general employ, but who at the time of his injury had been lent to respondent and was at work in the St. Louis Ordnance Plant (R. 1), when he was knocked off the side of a moving car by a light standard too close to the edge of a loading dock along which a cut of freight cars was passing.

The ordnance plant was owned, controlled and operated by respondent and Fitzjohn's work and duties as a switchman therein were exclusively and solely controlled and directed by respondent's employees acting within the scope of their employment (R. 1). All of the tracks, engines, loading docks, platforms, lights and other facilities in the plant were constructed for, and solely owned, maintained and operated by, respondent, through its employees acting within the scope of their authority (R. 1, 2). Petitioner had not the slightest control or right of control over the plant, the installations therein, the work being done by, or the duties assigned to, Fitzjohn (R. 1).

Fitzjohn sued petitioner, and on October 9, 1946, recovered against it a judgment in the sum of $47,500 (R. 2). This judgment became final when it was affirmed by the United States Court of Appeals for the Eighth Circuit, January 7, 1948 (R. 19), and rehearing therein was denied February 17, 1948 (R. 34).

Thereafter, while petitioner was preparing to apply to this Court for the issuance of its writ of certiorari in that action, and on April 2, 1948, it was agreed between petitioner and said Fitzjohn that his judgment should be, and it was, compromised and settled for the sum of

$40,000 (R. 3). To recover that sum, plus $2,292.28 spent in the defense of said action, the case at bar was begun.

The mandate of the United States Court of Appeals in Fitzjohn v. Terminal was received and filed in the District Court of the United States within and for the Eastern Division of the Eastern Judicial District, on April 8, 1948. Ten months and eight days subsequent to the filing of the mandate of said appellate court in the case of Fitzjohn v. Terminal Railroad Association of St. Louis, and ten months and fourteen days subsequent to the payment by petitioner of the judgment against it in Fitzjohn's favor, on, to-wit, February 16, 1949, the complaint herein was filed (R. 5).

The United States District Court within and for the Eastern Division of the Eastern Judicial District of Missouri, upon respondent's motion (R. 4, 5), dismissed (R. 6) this cause: on ground 2, a. (R. 4, 5) of said motion, viz., that Fitzjohn was injured prior to January 1, 1945, the effective date of respondent's waiver of immunity against being sued in tort.

Petitioner appealed to the court below which on April 27, 1950 (R. 19) amended and affirmed the judgment appealed from (R. 19).

The majority opinion of the court below concedes that petitioner's claim for reimbursement accrued on April 2, 1948, when it paid Fitzjohn; and that under the law of Missouri, the United States, if a private person, would be liable to petitioner for indemnity under the circumstances outlined in the complaint (R. 14). The majority of the Court below bases the dismissal of petitioner's action on the theory that "the United States was not under a legal obligation to Fitzjohn for the wrong done him by its employees in 1943, since at that time the Government had not consented to be sued upon tort claims" (R. 14). They reason from that hypothesis that the Federal Tort Claims

Act "reasonably may not be construed to cover claims based on torts committed prior to January 1, 1945 (R. 15).

QUESTION PRESENTED.

I.

Under the Federal Tort Claims Act, may petitioner after being compelled after the effective date of that act, to pay damages to one injured before its effective date, by a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place, where the act or omission occurred", have reimbursement from the United States.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

The question raised is an important one of federal law. This Court has not yet expressly answered it, but must eventually do so; because it will arise time after time. Therefore a prompt express answer obviously will promote the public interest. Its importance is no less than was that of the questions involved in the group of cases represented by U. S. v. Aetna Casualty & Surety Co., 94 L. Ed. (Adv. Op.) 151, wherein this Court granted certiorari.

II.

The decision of the majority below is untenable. Contrary to their holding, there is no ambiguity with respect to whether or not a right of action in the original sufferer from the tort is a condition precedent to the accrual of petitioner's right of reimbursement. The Act fixes no such limitation; although it would have been simple for Congress to have done so.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari shall be issued by this Court, addressed to the United States Court of Appeals within and for the Eighth Judicial Circuit, directing that Court to certify to this Court, on a day certain to be named therein, a full and complete transcript of the record of proceedings in said cause of Terminal Railroad Association of St. Louis, appellant, versus United States of America, appellee, that Court's number 14,068; to the end that the judgment of that Court herein may be reviewed by this Court, as provided by law; and that upon such review the judgment of that United States Court of Appeals herein shall be reversed and that petitioner shall be granted such relief as to this Court shall seem appropriate.

WARNER FULLER,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

212 Union Station,
St. Louis 3, Missouri,
GArfield 6600.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

SUMMARY OF ARGUMENT.

I.

It can scarcely be denied that the question here presented and as yet not expressly but impliedly answered by this Court is an important one of federal law, or that its final determination will obviously promote the public interest. This Court has impliedly answered it by its decisions in:

United States v. Aetna Casualty & Surety Co., 94 L. Ed. (Adv. Op.) 151, and companion cases.

II.

The decision of the majority below is untenable. The language of the Act clearly does not make a right of action in the primary sufferer of a wrong a condition precedent to a right of action in petitioner.

(a) The provision in the Act originally was that action thereunder must be brought "within one year after such claim accrued or within one year after August 2, 1946, whichever is later" (60 Stat. 845, 28 U. S. C. A., Sec. 942). Congress could as readily have provided for its commencement "within one year after the tort was committed."

(b) Moreover, the Act provides that the United States shall be liable to "the claimant," rather than the one primarily injured by the wrongful act.

III.

But assuming for argument's sake that the Act is open to interpretation, it must be liberally construed in petitioner's favor.

U. S. v. Aetna Casualty & Surety Co., 94 L. Ed. (Adv. Op.) 151, 161, and companion cases.

(a) The provision requiring suit to be brought within a year after the accrual of the cause of action was not a statute of limitation but of creation; and unless suit was brought within that time no right to sue ever came into existence.

Matheny v. Porter (10), 158 F. 2d 478, 479, 480;
The Harrisburg, 119 U. S. 199, 30 L. Ed. 358.

(a-1) In the Aetna Case, supra, "the injured person failed to commence any action against the United States within one year after the accident." Thus he failed to meet the condition precedent to the creation of a right of action in his favor. As a consequence he never had a cause of action against the United States. The same is true of Fitzjohn. (See petition for rehearing, R. 30 et seq.).

(b) Moreover, the liability of an active tort-feasor to one who pays damages in the former's behalf is not affected by the tort-feasor's nonliability to the injured person.

George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 490, 62 L. Ed. 422;
Westchester Lighting Co. v. Westchester Co. Small Estates Corp. (Ct. App. N. Y.), 15 N. E. 2d 567;
Barbara v. Ransom, 79 N. Y. S. 2d 438;
Green v. War Shipping Admn., 66 F. Supp. 393;
Venevento v. U. S. et al., 68 F. Supp. 347;
Severn v. U. S. et al., 69 F. Supp. 21.

ARGUMENT.

I.

A direct and express answer by this Court to the question whether or not a right of action in the direct sufferer of a wrong is a condition precedent to an action for reimbursement for damages paid to him by one not primarily responsible for the injury, is just as important as was the right of reimbursement of an insurance company for money paid by reason of the primary responsibility of the insured. Petitions for certiorari in actions presenting the latter question were granted by this Court and the question determined.

Aetna Casualty & Surety Co. v. U. S., 94 L. Ed. (Adv. Op.) 151, and companion cases.

II.

The holding of the majority below is based upon the postulate that as a condition precedent to jurisdiction in the district court, the tort by respondent must have been committed prior to January 1, 1945 (R. 14, 15), 28 U. S. C. A., Sec. 1346 (b). The Act does not so say expressly or impliedly.

(a) Congress could readily have so provided had it desired. The Act originally provided that action thereunder must be brought "within one year after such claim accrued * * *" (60 Stat. 845, 28 U. S. C. A., Sec. 942); not "after the commission of such tort"; not "after the suffering of such injury or damage." It would have been so simple to have made the jurisdiction dependent upon the date the tort was committed, that it seems clearly illogical to assume that Congress thoughtlessly failed to say what was intended.

On the other hand, the language used is so clear and explicit that it not only does not demand but does not per-

mit interpretation. A claim accrues at a fixed time always clearly ascertainable under the law. There is no uncertainty as to the accrual date of the primary sufferer's claim or as to an indemnitor's claim. They do not accrue at the same time. Congress must necessarily have known that when it chose to provide that action must be brought within one year "after such claim accrued." There is not the slightest uncertainty as to the meaning of that provision.

(b) There is another significant word in the Act. It provides that the United States shall be "liable to the claimant in accordance * * *." It is to be noted the Act does not limit recovery to the direct sufferer from the wrong; but to the claimant whether he shall be the person directly injured or someone else indirectly damaged by the wrongful act. Why did not Congress say "liable to the person suffering physical injury," if it was intended so to limit the jurisdiction of the district court?

The use of the words "accrual" and "claimant" demonstrates rather conclusively that Congress did not intend to limit recovery to the person upon whom the wrong was directly inflicted.

III.

But if it should be assumed that interpretation is called for or permitted, then the Act must be liberally construed to create causes of action and vest jurisdiction in the district courts. Aetna Casualty & Surety Co. v. U. S., 94 L. Ed. (Adv. Op.) 151, 161.

(a) The requirement that suit shall be brought within one year (now two years, 28 U. S. C. A., Sec. 2401) under what was originally 60 Stat. 845, was an integral part of the Federal Tort Claims Act. Therefore, it was a statute of creation, not limitation. As a consequence the commencing of an action within the specified time was a con-

dition precedent to the coming into existence of a right of action; rather than the cutting off of an existent right of action.

(a-1) This Court says in the Aetna Case (l. c. 150, 151): "The complaint further alleges that the injured person failed to commence any action against the United States within one year after the accident * * *." As a consequence of such failure, "the injured person" never had a live right of action against the United States because he failed to fulfill a condition precedent to a right of action.

Thus so far as a live right of action is concerned the sufferer in the Aetna Case and Fitzjohn had the same status, viz., neither had a right of action against the United States. This Court held notwithstanding that Aetna had a right of action. By the same reasoning, so has petitioner.

This matter is discussed in the petition for a rehearing below (R. 30 et seq.); and for brevity will not here be repeated.

(b) Moreover, even though the active tort feasor is not liable for tort, one who pays in his behalf has a right to be indemnified. This Court has so held in George A. Fuller Co. v. Otis Elevator Co., 245 U. S. 490, 62 L. Ed. 422. See also the other authorities cited under Summary of Argument, supra.

The question here presented must eventually be determined by this Court. It is important and urgent.

Respectfully submitted,

WARNER FULLER,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

212 Union Station,
St. Louis 3, Missouri,
GArfield 6600.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 200

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the United States District Court for the Eastern District of Missouri (R. 6) is not reported. The opinion of the Court of Appeals for the Eighth Circuit (R. 9-17) is reported at 182 F. 2d 149.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 27, 1950

(R. 17-18). A petition for rehearing was denied on May 22, 1950 (R. 33). The petition for a writ of certiorari was filed on July 14, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In 1943, a railroad worker was injured while employed by petitioner on Government property. For those injuries, he recovered damages from petitioner, in 1948, under the Federal Employers Liability Act. The Federal Tort Claims Act authorizes suit against the United States on only those claims accruing on and after January 1, 1945, and the United States has never, therefore, been under any legal liability to pay the railroad worker for his injuries.

The question presented is whether petitioner, in an action against the United States under the Federal Tort Claims Act, may recoup the amount of the damages it paid in 1948 to its employee for his 1943 injuries, where as stated, the United States has never been under any direct legal liability to the employee for those injuries.

STATUTE INVOLVED

28 U.S.C. 1346(b), formerly part of the Federal Tort Claims Act, is set out in the Appendix, *infra*, p. 12.

STATEMENT

Petitioner, under an arrangement with the United States owned-and-operated St. Louis

Ordnance Plant, regularly sent a crew of its switchmen into the Plant for the purpose of switching cars over the various railroad tracks running through the Plant. *Terminal R. Ass'n of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C.A. 8).[1] During the night of June 10, 1943, one of petitioner's switchmen, Cornelius W. Fitzjohn, was injured while riding on the side ladder of a freight car in the course of switching cars within the Plant (R. 1, 2).

Fitzjohn brought suit against petitioner in the appropriate district court under the Federal Employers Liability Act, 45 U.S.C. 51 *et seq.* (R. 2). He showed that a vertical iron pipe, on which an electric light was mounted and which was located too close to the edge of the track, had hit him as he was riding by, forcing him off the side of the car and causing him serious injuries (R. 3). The district court ruled that petitioner was negligent in failing to furnish Fitzjohn with a safe place to work. It further found that Fitzjohn, at the time of the accident, was an employee of the petitioner, rather than of the United States, and awarded him a $47,500 judgment against petitioner (R. 2). The Court of Appeals for the Eighth Circuit affirmed the judgment on both grounds (R. 3); *Terminal R. Ass'n of St. Louis* v. *Fitzjohn,* 165 F. 2d 473 (C.A. 8). Thereafter, on

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[1] This case, referred to in petitioner's complaint (R. 3) and in its petition (Pet. 3, 4), discusses the details of this arrangement.

April 2, 1948, petitioner paid Fitzjohn $40,000 in settlement of the judgment (R. 3).

On February 16, 1949, petitioner instituted the instant action in the United States District Court for the Eastern District of Missouri against the United States under the Federal Tort Claims Act, seeking reimbursement for the amount of the settlement and for monies expended by it in defending the Fitzjohn suit (R. 4). The complaint alleged that Fitzjohn's injuries were caused by the negligence of employees of the United States in constructing and placing the light standard too close to the railroad track (R. 2). It further asserted that the alleged act of negligence compelled it to make the $40,000 payment to Fitzjohn as well as additional payments for the legal expenses incurred in defending the Fitzjohn suit. The United States filed a motion to dismiss on the grounds, *inter alia,* that the Federal Tort Claims Act does not cover indemnity actions, and that, in any event, the Act does not cover such an action, where the tort claim on which it is based, accrued prior to January 1, 1945 (R. 4-5).

The motion to dismiss was granted by the district court (R. 6). On appeal the court below pointed out that the Federal Tort Claims Act allows suits on injuries occurring after January 1, 1945 and that the United States therefore was never under any legal obligation to Fitzjohn for his 1943 injuries (R. 13, 14). And, since petitioner, "in satisfying the judgment of Fitzjohn,

discharged no obligation legally owing from the Government to Fitzjohn," the court affirmed the dismissal of petitioner's indemnity action (R. 14, 15). Judge Woodrough dissented (R. 15-17).

ARGUMENT

The only question urged by petitioner as being of general importance is not involved here. Whether the Federal Tort Claims Act (28 U.S.C. 1346(b), *infra*, p. 12) covers indemnity actions and thereby allows suit not only by the "person directly injured" but also by "someone else indirectly damaged by the wrongful act" (Pet. 10) appears to be a question of importance. But that issue is not presented by the instant case. Instead of passing on that point, the court below concluded that the complaint did not state a cause of action in indemnity because the railroad employee's injuries occurred prior to 1945 and the United States could not, therefore, have been directly liable to him for those injuries. Recognizing that the court below did not have to decide whether indemnity actions are covered by the Act, petitioner admits that that court's opinion "is based exclusively on the interpretation that the Act covers only those instances in which the original sufferer from the governmental wrong was injured subsequent to January 1, 1945" (R. 26; see Pet. 4).

That interpretation was the ground on which the court below affirmed the dismissal of the complaint

and raises the sole question now involved in the case. The affirmance, we believe, was plainly correct, and does not warrant further review by this Court.

1. The basis of an indemnity action is the payment by the indemnitee to the injured party of an obligation that should have been discharged by the indemnitor. It is predicated on the primary liability of the indemnitor to the injured party, even though the indemnitee, for some other reason, is secondarily liable to that party. See *Union Stock Yards Co.* v. *Chicago, B. & Q. R. Co.,* 196 U. S. 217, 224-225; *Fidelity and Casualty Co. of New York* v. *Federal Express,* 136 F. 2d 35 (C.A. 6). Discharge of the liability by the indemnitee, the person secondarily liable, leaves him with a right to secure restitution, on the theory of unjust enrichment, from the indemnitor, the person primarily liable. See *Imperial Refining Co.* v. *Kanotex Refining Co.* 29 F. 2d 193, 201 (C.A. 8); *George's Radio* v. *Capital Transit Co.,* 126 F. 2d 219, 222 (C.A.D.C.). In effect, the indemnitor's liability to the indemnitee is "for reimbursement of money paid for and on [the indemnitor's] behalf, which under the law the [indemnitor] was liable for and should have paid." *Appalachian Corp.* v. *Brooklyn Cooperage Co.,* 151 La. 41, 51. "Plain dictates of reason and natural justice" create this implied contract of indemnity in favor of the indemnitee. *Vandiver*

& Co. v. *Pollak,* 107 Ala. 547, 555. Otherwise, the person primarily liable to the injured person would be exculpated from liability at the expense of the person secondarily liable.

Thus, underlying the indemnity action is the existence of a direct and primary liability on the part of the indemnitor to the injured person. In the absence of such a liability, it is obvious that the indemnitee, by making payment to the injured person, is in no way benefitting the indemnitor, or discharging a duty owed by the latter to the injured person, and will not therefore be allowed reimbursement. *Central Surety and Ins. Corp.* v. *Hinton,* 233 Mo. App. 1218; *City of Springfield* v. *Clement,* 296 Mo. 150. The decision in *Fuller Co.* v. *Otis Elevator Co.,* 245 U. S. 489, relied on by petitioner (Pet. 11) is not to the contrary. Indeed, that opinion, fully recognizing that the indemnitee was entitled to reimbursement only because "the primary duty rested on the Elevator Company", the indemnitor, affirmed a jury verdict in favor of the indemnitee on the ground that the indemnitor, having retained control over the elevator operator whose negligence caused the injuries involved, was primarily responsible for his tortious conduct. 245 U. S. 489, 491.[2]

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[2] Nor do any of the lower court cases cited by petitioner support its position. Thus, *Green* v. *War Shipping Admin.,* 66 F. Supp. 393 (E.D.N.Y.); *Benevento* v. *United States,* 68 F. Supp. 347 (S.D.N.Y.), affirmed on other grounds, 160 F. 2d 487 (C.A. 2); and *Severn* v. *United States,* 69 F. Supp. 21 (S.D. N.Y.), were cases where the United States impleaded the employer of the libellant, relying on an *express* contract of

There can be no doubt that the United States never could have been held liable to Fitzjohn for his 1943 injuries. The Federal Tort Claims Act, as originally written, allowed suit on only those tort claims "accruing on and after January 1, 1945" (Section 410(a), 60 Stat. 843-844). When amended by the Act of April 25, 1949, the identical limitation to claims "accruing on and after January 1, 1945" was reincorporated into the Act (Section 2(a) of Public Law 55, 81st Cong., 1st sess., amending 28 U.S.C. 1346(b)). Since the United States never consented to suit on torts occurring prior to 1945, it is obvious that petitioner's employee himself never had any cause of action against the Government. See *Perry* v. *United States,* 170 F. 2d 844 (C.A. 6); *Oahu Ry. & Land Co.* v. *United States,* 73 F. Supp. 707 (D. Hawaii). Consequently, as observed by the court below (R. 14), petitioner, in paying its employee for his 1943 injuries, did not discharge any obligation owed to the employee by the United States and so has no valid claim for indemnity against the United States.

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indemnity, not on any unjust enrichment of the indemnitor which would furnish the basis for the type of quasi-contractual action of indemnity petitioner sought to bring here. Similarly, in *Westchester Lighting Co.* v. *Small Estates Corp.,* 287 N.Y. 175, the court pointed out that the suit there was for the "breach of an alleged *independent* duty or obligation owed" [italics supplied] to the indemnitee by the indemnitor. 278 N.Y. 175, 179. *Barbara* v. *Ransom,* 79 N.Y. Supp. 2d 438, simply relies on the *Westchester* case, and goes no further.

2. Nor is there any merit to petitioner's contention that a different result is required by *United States* v. *Aetna Surety Co.*, 338 U. S. 366. Seizing on a portion of a sentence in the *Aetna* case to the effect that there "the injured person failed to commence any action against the United States within one year after the accident" (Pet. 11), petitioner points to the Federal Tort Claims Act's former one year limitation period (Section 420, 60 Stat. 845),[3] concludes that the injured person therefore "never had a live right of action against the United States" (Pet. 11), and argues that since this Court nevertheless recognized Aetna's right of action against the United States, similar recognition should be accorded the instant indemnity claim against the United States even though petitioner's employee never had an action against the United States for his injuries. Apart from the inherent differences between a subrogation claim (involved in the *Aetna* case) and an indemnity claim, which make the rationale of the *Aetna* opinion wholly inapplicable here,[4] petitioner's argument ignores the fact that the injury

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[3] The limitation period is now two years. 28 U.S.C. 2401(b), as amended by Section 1 of Public Law 55, 81st Cong., 1st Sess., April 25, 1949.

[4] A subrogee, of course, stands in the shoes of the injured person, and in asserting his action *ex delicto* against the tortfeasor, is subject to the same defenses the tortfeasor could have asserted against the injured person. *United States* v. *Munsey Trust Co.*, 332 U. S. 234, 242. The indemnitee, on the other hand, seeks reimbursement against the tortfeasor on quasi-contractual grounds. *Supra*, pp. 6-7.

in the *Aetna* case occurred on February 8, 1945,[5] and that under the Act, which took effect on August 2, 1946, the injured person could have brought suit "within one year after such claim accrued or within one year after the date of enactment of this Act, whichever is later" Section 420, 60 Stat. 845. Thus, the injured person in that case had until August 2, 1947 to bring suit. Actually, as was pointed out to petitioner in the brief we filed below, Aetna brought that suit against the United States on May 28, 1947, several months before the statutory period would have expired as against the injured person and therefore as against Aetna as well.[6] Accordingly, petitioner's reliance on the *Aetna* case is, we submit, altogether misplaced.

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[5] *Aetna Casualty & Surety Co.* v. *United States*, 170 F. 2d 469, 470 (C.A. 2).

[6] In this connection, it should also be noted that the statement in the *Aetna* case with respect to the failure to institute suit within one year after the accident had reference, not as petitioner intimates, to any statutory period of limitations in the Federal Tort Claims Act, but only, as the full sentence in which the statement appears makes clear, to the New York statutory provision requiring assignment of the claim to the insurance carrier where the injured person fails to commence action against the tortfeasor within one year after the claim accrued. 338 U. S. 366, 368.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for writ of certiorari should be denied.

ARNOLD RAUM,
Acting Solicitor General.
H. G. MORISON,
Assistant Attorney General.
PAUL A. SWEENEY,
MORTON HOLLANDER,
RICHARD P. WILLIAMS, III.,
Attorneys.

AUGUST, 1950.

APPENDIX

28 U.S.C. 1346(b), as amended by Section 2(a) of Public Law 55, 81st Cong., 1st Sess., April 25, 1949, provides:

§ 1346. United States as defendant.

* * * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

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